

The Department's regulation at 86 Ill. Adm. Code 130.2076 sets forth specific rules for sales to purchasers performing contracts with governmental bodies. This letter discusses this regulation and also the Manufacturer's Purchase Credit. (This is a GIL).

December 7, 2007

Dear Xxxxx:

This letter is in response to your letter dated May 2, 2006, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

On behalf of our client CLIENT (hereinafter referred to as 'CLIENT' or 'our client'), we respectfully request the issuance of a private letter ruling by the Illinois Department of Revenue pursuant to 2 Ill. Adm. Code 1200.110.

General Information

1. This Private Letter Ruling ('PLR') is not requested with regard to hypothetical or alternative proposed transactions. This PLR is requested to determine the sales and use tax consequences of the actual business practice of the Company.
2. The Company is not currently engaged in litigation with the Department with regard to this or any other tax matter.
3. The Company is currently under sales tax and income tax audits by the Department. The subjects of this ruling request are not at issue in the audits being conducted by the Department.
4. The Department has not previously ruled regarding this matter for Company. Neither the Company nor ABC has submitted the same or similar issue to the Department on behalf of the Company.

5. We are aware of no authority contrary to the authorities referred to and cited below.

Statement of Facts

CLIENT is a retailer of ready mix concrete. Purchasers of ready mix concrete contract with CLIENT for the delivery of ready mix concrete in CLIENT's trucks to the purchaser's job site. CLIENT sells ready mix concrete for use in construction projects by private entities and governmental bodies.

The ingredients of ready mix concrete are loaded into the drum mixer on the truck. The ingredients are mixed, through rotation of drum mixer until the delivery of the ready mix concrete to the purchaser is complete.

Requested Rulings

- A. Certain purchases of fuel used and consumed by CLIENT in conjunction with the sale of ready mix concrete for use in state and local governmental construction projects are exempt from the Illinois Retailers' Occupation Tax and Use Tax.**

The Retailers' Occupation Tax Act is a tax 'imposed upon persons engaged in the business of selling at retail tangible personal property...' (35 ILCS 120/2) The tax 'is measured by the seller's gross receipts from such sales made in the course of such business.' (86 Ill. Adm. Code 130.101)

Section 2-5(11) of the Retailers' Occupation Tax provides an exemption from the tax for personal property sold to a governmental body (35 ILCS 120/2-5(11)). The Department has adopted regulations that provide additional guidance with respect to the scope of the exemption (86 Ill. Adm. Code 130.2075 and 130.2076). Section 130.2075(d) sets forth the Department's rules governing sales of materials to construction contractors acting for exclusively charitable, religious or educational organizations or institutions, or for governmental bodies. Section 130.2075(e) of the Department's rules governs sales of materials to construction contractors for incorporation into public improvements which are required to be transferred to a unit of local government upon completion.

Both of the subsections of Section 130.2075 cited above implement the statutory exemption for tangible personal property sold to a governmental body. The rules also explain that the exemption 'flows through' to construction contractors that engage in construction projects for governmental bodies.

Section 130.2076 sets forth specific rules for sales to purchasers performing contracts with governmental bodies. Section 130.2076 of the Department's rules was adopted subsequent to a decision of the United States Supreme Court handed down in 1982. In *United States v. New Mexico*, 1982, 455 U.S. 720, the U.S. Supreme Court clarified the required scope of the exemption from tax afforded to sales to governmental bodies and others performing work on behalf of governmental bodies.

Section 130.2076 elaborates specifically, upon situations involving contractors that purchase items to fulfill obligations under a contract with a governmental unit. Section

130.2076(a) states that '[h]owever, if the contract with the governmental unit explicitly requires the contractor to sell those items to the governmental unit, the purchase of those items by the contractor can be structured as purchases for the purpose of resale to the governmental unit.' Section 130.2076(a) sets forth as conditions that there must be a contract between the purchaser and the governmental body that requires the purchaser to provide tangible personal property to the government body and the contract is specific in documenting a sale of tangible personal property from the purchaser to the governmental body. Subsection 130.2076(a)(2) states that 'the contract does not have to be item specific.'

Section 130.2076(b) provides 'for example, the exemption applies to consumable supplies, such as fuel, that a purchaser uses to fulfill the contract with the governmental body so long as the conditions set forth in subsection (a) are met.' It must be noted that the exemption for consumable supplies such as fuel afforded by Section 130.2076(b) is a bit more expansive than the scope of the exemption set forth in Section 130.2075. Section 130.2075(d)(3), enacted many years prior to the Supreme Court's decision in U.S. v. New Mexico provides that certain items such as fuel are taxable. While this rule may continue to have applicability to sales tax exempt entities other than governmental bodies, in light of the U.S. Supreme Court's decision in U.S. v. New Mexico the Department adopted Section 130.2076(b) which applies to activities of construction contractors performing work for governmental bodies.

As noted above, CLIENT makes sales to contractors who make purchases from CLIENT to fulfill their obligations under contracts with governmental bodies. The contractors contract for purchases of ready-mix concrete. In making the purchases of ready mix concrete, the governmental contractors incur charges for 'consumable supplies, such as fuel' used to generate power to mix the ready-mix concrete and power the trucks used to transport the ready-mix concrete to construction sites. Pursuant to Section 130.2076(b), the purchases of fuel by CLIENT used in mixing and transporting the ready-mix concrete may be made tax-free so long as CLIENT provides a certificate of resale to its fuel suppliers for the portion of its fuel purchases that qualify as exempt, and obtains and maintains among its records a certificate of resale from the purchasing governmental contractor that conforms to the requirements set forth in Section 130.1405 of the Department's rules (See 86 Ill. Adm. Code 130.2076(c))¹.

B. The Illinois Manufacturers Purchase Credit ('MPC') earned by CLIENT may be used to offset Illinois Retailers' Occupation Tax and Use Tax on certain fuel purchases used and consumed by CLIENT.

Section 3-85 of the Retailers' Occupation Tax establishes the Manufacturers' Purchase Credit (35 ILCS 120/3-85) Section 3-85 of the ROT and Section 130.331(a)(1) of the Department's rules provide that 'effective January 1, 1995 through June 30, 2003 and beginning again September 1, 2004, a manufacturer may earn a credit when purchasing exempt manufacturing machinery and equipment.' The amount of the credit is equal to 50% of the 6.25% State rate of tax that would have been incurred on the purchase of exempt manufacturing machinery and equipment.

Section 2-45 of the Retailers' Occupation Tax Act and Section 130.330 of the Department's rules set forth the requirements for the manufacturing machinery and equipment exemption from the ROT. In 1989, the Illinois Supreme Court determined that ready-mix concrete trucks are manufacturing machinery and equipment exempt

from taxation under the ROT (*Van's Material v Department of Revenue*, 1989, 131 Ill.2d 196).

Section 3-85 of the Illinois Use Tax Act states that the MPC may be used to satisfy use tax liability incurred on the purchase of qualifying production related tangible personal property. Section 130.331(b)(3) of the Department's rules sets forth the definition of 'production related tangible personal property.' Section 130.331(b)(4)(D) states that production related tangible personal property includes '...fuels, coolants, solvents, oils, lubricants, cleaners and adhesives.'

CLIENT earns MPC when it purchases ready-mix concrete trucks and replacement parts for those trucks. CLIENT makes purchases of fuel, coolants, oils and other lubricants that are used in ready-mix concrete trucks. These items are production-related tangible personal property within the definition of that term found in Illinois law and rules. Therefore, CLIENT may use MPC earned in the purchase of ready-mix concrete trucks to offset the state 6.25% tax that would otherwise be due on the purchase of these items.

Request for a Conference

We respectfully request a personal conference to discuss these matters orally, if the Department believes such may be helpful or if the Department of Revenue may otherwise render a ruling contrary to our client's position.

If you have any questions or would like to discuss this matter further, please contact me at your convenience.

DEPARTMENT'S RESPONSE

We are unable to issue you a Private Letter Ruling without being able to review the written contracts between the parties. We have delayed the issuance of this letter for a significant amount of time to allow your client to provide copies of those contracts. Because we have not been provided with copies of those contracts, we cannot issue you a Private Letter Ruling. We have set out some general information that may be of assistance to you in determining your client's sales tax liabilities.

Government Contracts

As you have noted in your request, Section 130.2076 of the Retailers' Occupation Tax (86 Ill. Adm. Code 130.2076) regulations sets forth specific rules for sales to purchasers performing contracts with governmental bodies. Section 130.2076 includes language regarding contractors that purchase items to fulfill obligations under a contract with a governmental unit. Section 130.2076(a) states that "if the contract with the governmental unit explicitly requires the contractor to sell those items to the governmental unit, the purchase of those items by the contractor can be structured as purchases for the purpose of resale to the governmental unit." In order for this to happen, there must be a contract between the purchaser and the governmental body that requires the purchaser to provide tangible personal property to the governmental body, and the contract must be specific in documenting a sale of tangible personal property from the purchaser to the governmental body. Subsection 130.2076(a)(2) states that "the contract does not have to be item specific." For example,

“the exemption applies to consumable supplies, such as fuel, that a purchaser uses to fulfill the contract with the governmental body.” 86 Ill. Adm. Code 130.2076(b).

Manufacturer’s Purchase Credit

The Illinois Supreme Court determined in Van's Material v Department of Revenue, 131 Ill.2d 196 (1989), that cement mixing trucks may qualify as manufacturing machinery and equipment if they are used in a qualifying manner. The cement mixing trucks must be used primarily (over 50% of the time) in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease. See 86 Ill. Adm. Code 130.330.

Section 3-85 of the Illinois Use Tax Act states that the Manufacturer’s Purchase Credit (“MPC”) may be used to satisfy use tax liability incurred on the purchase of qualifying production related tangible personal property. The Department’s regulation for the MPC provides, in relevant part, that “[b]y way of illustration and not limitation, the following uses of tangible personal property will be considered production related:...[s]upplies and consumables used in a manufacturing facility, including fuels, coolants, solvents, oils, lubricants, cleaners and adhesives.” See subsection (b)(4) of 86 Ill. Adm. Code 130.331. This means that MPC may be applied to the State tax due for purchases of these items. See subsection (b)(1) of 86 Ill. Adm. Code 130.331

The Department’s administrative rules concerning MPC specifically provide that fuel used in a cement mixing truck to rotate the mixing drum can qualify as production related tangible personal property. Subsection (b)(4)(E) of 86 Ill. Adm. Code 130.331 states:

- “E) Fuel used in a ready-mix cement truck to rotate the mixing drum in order to manufacture concrete or cement. However, only the amount of fuel used to rotate the drum will qualify. The amount of fuel used or consumed in transportation of the truck will not qualify as production related tangible personal property. The amount of fuel used in a qualifying manner to rotate the drum may be stated as a percentage of the entire amount of fuel used or consumed by the ready-mix truck.”

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department’s Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton
Senior Counsel, Sales & Excise Taxes

TDC:msk

¹ Section 130.1405(c)(2) authorizes CLIENT to provide a ‘percentage’ certificate of resale to its suppliers that sets forth the percentage of purchases that are tax-exempt.